THE HON'BLE Ms. JUSTICE G. ROHINI

WRIT PETITION Nos.3410, 3411, 3435, 1816, 22509, 22580 & 19174 OF 2005

Dated: January, 2006.

Between:

Indur Green Power Private Limited, 3-5-821,

1st floor, 104 Doshi Square, Hyderguda,

Hyderabad-500 029, rep. by its Director

Sri B. Appa Rao, S/o. Chennakeshava Rao,

Aged about 47 years, R/o. Gandhi Nagar,

Hyderabad-500 080. … (Petitioner in W.P.

No.3410/2005)

And

1. Transmission Corporation of Andhra Pradesh Ltd.,
   Vidyut Soudha, Hyderabad, rep. by its Chairman &
   Managing Director.
2. Andhra Pradesh State Regulatory Commission, Singareni
   Bhavan, Red Hills, Hyderabad, rep. by its Chairman.
   … (Respondents in W.P.
   No.3410/2005)

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COMMON ORDER:

The petitioners in all these writ petitions are generating companies in non-

conventional energy sector. Whereas the petitioners in W.P.Nos.3410, 3411, 3435 & 1816 of 2005 are generating electricity from Biomass, the petitioners in W.P.Nos.22509, 22580 & 19174 of 2005 are engaged in the generation of electricity from Bagasse. Since all the writ petitions are based on the same set of facts and are filed aggrieved by the action of the 1st respondent – Transmission Corporation of Andhra Pradesh Limited (for short, 'APTRANSCO) in deducting the payment for energy delivered by the petitioners in excess of the amount of energy corresponding to 100% PLF during the each 30 minutes time block, they are clubbed and decided by this common order.

For proper appreciation of the controversy involved, it would be appropriate to refer to the facts in W.P.No.3410 of 2005 in brief. The petitioner is a Company engaged in generation of electricity from Biomass. The energy generated by the petitioner is being purchased by the 1st respondent-AP TRANSCO under a Power Purchase Agreement (for short, 'PPA') dated 16.02.2002. It is not in dispute that as per the terms and conditions of the agreement, initially the 1st respondent was purchasing the entire energy delivered by the petitioners at the rate of Rs.3.48 Ps per unit. However, from the billing month of January, 2004 onwards, the 1st respondent started deducting payment for the energy delivered by the petitioners in excess of the amount of energy corresponding to 100% PLF during the each 30 minutes time block. By a letter dated 26.06.2004, the petitioner was informed by the 1st respondent that as per the directions of the 2nd respondent-A.P. Electricity Regulatory Commission (for short, 'APERC'), vide order dated 15.11.2003, the excess energy delivered over and above 100% PLF during the periods (i.e., 30 minutes time block) by the Non-conventional energy (NCE) Power Projects cannot be purchased. It was also informed that in view of the said order, the amount for the quantum of excess energy delivered above 100% PLF during the each 30 minutes time block for the months from December, 2003 to May, 2004, was deducted from the power purchase bill payable for the billing month of May, 2004. It was further informed that the balance of Rs.3,81,442.80 ps would be collected in the bill of June, 2004.

It is relevant to note that in the letter dated 26.06.2004 it was also mentioned that the

order of the 2nd respondent dated 15.11.2003 was applicable to all the Non-conventional Energy (NCE) Projects, being parties to the said order. Since the 1st respondent did not furnish any particulars as to how the said amount was arrived at, except mentioning the total number of units of alleged excess energy, and particularly since in the letter dated 26-06-2004 it was indicated that such deductions would be made in future also, the petitioner by letter dated 28.06.2004 requested the 1st respondent to furnish all the necessary details. The petitioner also made an application to the 2nd respondent, requesting to furnish a certified copy of the order dated 15.11.2003, since the same was never communicated, much less there was any notice at any time about the proceedings relating thereto. Since there was no response from the respondents, the petitioner filed W.P.No.11576 of 2004 seeking a Writ of Mandamus declaring the order of the 2nd respondent dated 15.11.2003 as well as its earlier order dated 18.08.2003 as arbitrary and illegal, and for a further declaration that the 1st respondent is liable to purchase and pay for all the energy delivered from the Power Project of the petitioner as per the existing Power Purchase Agreement dated 16.02.2002. The petitioner also sought for a declaration that the action of the 1st respondent in deducting the amount under its letter dated 26.06.2004 towards the alleged quantum of excess energy delivered above 100% PLF during each 30 minutes time block for the months from December, 2003 to May, 2004 is arbitrary and illegal. Having entertained the said Writ Petition, this Court by order dated 9.07.2004 granted interim suspension of the proceedings dated 26.06.2004. However, the 1st petitioner did not comply with the said interim order and the amounts, which were already deducted under the proceedings dated 26.06.2004, were not repaid.

While so, the 1st respondent addressed a letter dated 5.08.2004 to the Biomass Energy Developers Association, with copies to the developers, who had filed Writ Petitions in this Court questioning the deductions made for the excess energy delivered, including the writ petitioner, stating that it had been decided by the 1st respondent to calculate the PLF (Plant Load Factor) on monthly basis to arrive at the purchasable energy limiting to 100% PLF as was done earlier, provided the Writ Petitions pending were withdrawn, so as to facilitate the respondents to implement the monthly PLF principle retrospectively, from December, 2003. The same was

further reiterated in another letter dated 8.10.2004 addressed to the writ petitioner.

Relying on the assurance given by the 1st respondent, the petitioner withdrew W.P.No.11576 of 2004 and the same was dismissed as withdrawn by order dated 26.10.2004. However, the 1st respondent failed to take any steps to release the pending payments as assured in their letters dated 5.08.2004 and 8.10.2004 despite several representations made by the petitioner. In the circumstances, the petitioner addressed a letter dated 3.01.2005 to the Chairman and Managing Director of the 1st respondent requesting to implement the monthly PLF principle retrospectively, from December, 2003 as promised, forthwith and consequently, to make payment of the amount due to the petitioner. However, the 1st respondent failed to respond. Hence the Writ Petition with the following prayer :

> "*It is prayed that this Hon'ble Court may be pleased to issue an appropriate writ or order more particularly one in the nature of a Mandamus or declaration;*
>
> *"(a) declaring the action of the 1st respondent in not fulfilling the promise and assurance of implementing the monthly PLF principle retrospectively from December, 2003 upon withdrawal of the petitioner's Writ Petition as per the 1st respondent's letter CERTIFICATES/Coml&IT/Non-conventional energy (NCE)/F-Biomass/D.No.645/04 dated 5.8.2004 as mala fide, illegal and gross misconduct; and*
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> *(b) declaring the action of the 2nd respondent in initiating proceedings and issuing the order/directions in Letter No.A.P. Electricity Regulatory Commission/Secy/Dir(Engg)/DD(Tr)/F-PPA/D.No.1892/2003 dated 18.8.2003 and the further order/direction in the 2nd respondent's letter No.A.P. Electricity Regulatory Commission/ Secy/ Dir(Engg) /DD(Tr)/F-PPA/D.No.2739/2003 dated 15.11.2003 as illegal and contrary to law and to set aside the same; and*
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> *(c) declaring that the 1st respondent is liable to purchase and pay for all the energy delivered from the power project of the petitioner to the 1st respondent as per the existing Power Purchase Agreement between the 1st respondent and the petitioner without any limitation; and*
>
> *(d) declaring the action of the 1st respondent as communicated by the*

1st respondent's letter FA&CCA/A&D/SAO/Public Prosecutor&S/D.No.650/04 dated 26.6.2004 in deducting the amount for the alleged quantum of excess energy delivered above 100% PLF during each 30 minutes time block for the months from December 2003 to May 2004 and subsequently as arbitrary, unreasonable and contrary to law;

(e) and/or pass such further or other orders as this Honourable Court may deem fit and proper so that justice may be done."

W.P.Nos.3411, 3435 & 1816 of 2005, which arise out of the Power Purchase Agreements dated 16.02.2002, 16.02.2002 and 18.02.2002 respectively, are also filed with identical prayers.

In Writ Petition Nos.22509, 22580 & 19174 of 2005 which arise out the Power Purchase Agreements dated 10-07-2002, 19-02-2002 and 14-08-2001 respectively, it was prayed as under :

"… … … may be pleased to issue an appropriate writ, order or direction, more particularly a writ in the nature of Mandamus, directing the respondents to pay up to the petitioner all the dues / arrears occasioned by the deducting the amount for the alleged quantum of excess energy delivered above 100% PLF during each 30 minutes time block for the months from December 2003 to May 2004, as being illegal, arbitrary and is violative of Articles 14 and 300-A of the Constitution of India."

The 1st respondent filed separate counter-affidavits in which the fact that APTRANSCO entered into Power Purchase Agreements with the petitioners in the format approved by the 2nd respondent has not been disputed. It was also admitted that the petitioners were granted sanction by the Non-conventional Energy Development Corporation (NEDCAP) which was designated as the Nodal Agency for the development of non-conventional energy.

It is further explained that the agreements inter alia stipulated that APTRANSCO would purchase power which the petitioners would generate with the installed capacity declared by them. The commitment under the agreements which set out the installed capacity in the Schedule-I was to purchase the power which would be generated with the declared installed capacity. It is also stated that having regard to the State policy of encouraging the production of non-conventional energy,

APTRANSCO was required to pay a rate in excess of the rate at which conventional energy was available. Thus, the APTRANSCO was in effect subsidising the power manufactured from non-conventional energy sources. It was therefore deemed necessary to stipulate that the energy purchasable by APTRANSCO was limited to that which could be produced normally with the approved installed capacity. It was further explained that so far as the petitioner in W.P.No.3410 of 2005 is concerned the normal production for 6 MW installed capacity at Plant Load Factor of 100% (100% PLF) is 4320000 units per month (30 days). Ordinarily, the Plant Load Factor (PLF) does not exceed 80%. Calculating like this, for 5.52 MW (excluding Auxiliary Consumption of 8%), the maximum production that could be delivered is 3974400 units per month at 100% PLF. It is only this quantity of power, which APTRANSCO is obligated to buy. Similar calculations were made with regard to other petitioners also basing on their installed capacity. Hence, the APERC passed orders on 15-11-2003 to eliminate the lacunae in the original contract. The said direction was binding on all the parties. The Commission is vested with the exclusive power of determining the tariff and the Commission is also entitled to pass appropriate orders as under the proceedings dated 15-11-2003 as agreed under Article 7 of the Agreements.

So far as the assurance given earlier for reversion to the monthly billing methodology, in pursuance of which the petitioners withdrew the earlier writ petitions, it is stated that the Chief Engineer, APTRANSCO addressed the letters in response to a general representation made by the petitioners and other members of the association overlooking the scope of the binding directive of the Commission. The petitioners cannot be granted any relief on the basis of the communication dated 5-8-2004 which was beyond the jurisdiction of APTRANSO and therefore the matter is now referred to APERC for clarification.

The 1st respondent filed additional counter-affidavits stating that as per the provisions of the agreements, the APTRANSCO had no commitment to purchase surplus power than the agreed capacity in the power project agreements. It is further stated that the Commission in tariff computation has considered 80% PLF on the

basis of the representations of the association to which the petitioners are also members stating that their plants can run at 80% PLF only. Hence, the APTRANSCO is not obligated to purchase entire power generated by the petitioners.

I have heard the learned counsel for both the parties and perused the material on record.

The learned Senior Counsel appearing for the 1st respondent-Corporation at the outset raised an objection as to the maintainability of the Writ Petitions. The learned Counsel points out that against the order of the 2nd respondent dated 15.11.2003, which forms the basis for the impugned letter of the 1st respondent dated 26.06.2004, an alternative remedy of Appeal is available under Section 111 of the Electricity Act, 2003 and without exhausting the said alternative remedy of Appeal, the petitioners cannot maintain the Writ Petitions under Article 226 of the Constitution of India.

The learned Senior Counsel submits that even otherwise, the 2nd respondent-APERC under Section 94(f) of the Electricity Act, 2003, is competent to review its own decision. That apart, Section 62 of the Electricity Act, 2003 confers all the powers relating to determination of power tariff exclusively on the 2nd respondent-APERC. Having regard to the said efficacious remedies available under the statute, the learned senior counsel contends that the petitioners ought not to have approached this Court straightaway.

A perusal of the order passed by the 2nd respondent-APERC dated 15.11.2003 shows that the 1st respondent proposed certain amendments to Article 1.4 of the Power Purchase Agreements with regard to “delivered energy” by the Non-conventional energy power projects and on the basis of the same, the 2nd respondent - APERC approved modifications. The Annexure-II to the proceedings dated 15.11.2003 shows the modifications approved by the 2nd respondent –

APERC which are applicable to the Non-conventional energy power projects other than Mini-Hydel and Wind Farms. However, admittedly, before approving the amendments in question, the petitioners and other similarly situated non-conventional energy power projects were neither issued a notice nor given any opportunity to raise their objections. It is also not in dispute that the said amendments were not even carried out in the agreements entered into with the petitioners before affecting the deduction of payment in terms of the amended clause. In the circumstances, as rightly contended by the learned counsel for the petitioners, the order dated 15.11.2003 is not only in violation of the principles of natural justice, but the same is also not in conformity with the mandatory procedure prescribed under the Electricity Act, 2003 as well as the Electricity Regulatory Commission (Conduct of business) Regulations, 1999.

The law is well-settled that when the order impugned is *ex facie* in violation of the statutory provisions and also not in conformity with the fundamental principles of natural justice, notwithstanding the availability of alternative remedy, the judicial review under Article 226 of the Constitution of India is permissible.

Hence, I am unable to agree with the preliminary objection raised by the learned Counsel for the 1st respondent as to the maintainability of the writ petitions on the ground of availability of the alternative remedy under the statute.

So far as the merits of the case are concerned, admittedly the Power Purchase Agreements in favour of the petitioners were executed with the prior sanction of the 2nd respondent-APERC. It is also not in dispute that the format of the agreements as well as the tariff were determined by the 2nd respondent-APERC.

Article 1.4 of the agreements in question defines the delivered energy as under :

> *"1.4* ***Delivered Energy:*** *means, with respect to any Billing Month, the kilo watt hours (kWh) of electrical energy generated by the Project and delivered to the APTRANSCO at the Interconnection Point as defined*

in Article 1.8, as measured by the energy meters at the Interconnection Point during that Billing Month.

Explanation: *For the purpose of clarification, Delivered Energy, excludes all energy consumed in the Project by the main plant and equipment, lighting and other loads of the Project from the energy generated and as recorded by energy meter at Interconnection Point."*

It is the specific case of the respondents that the energy purchasable by the 1st respondent shall be limited to the energy produced by the petitioners with the approved installed capacity since the APTRANSCO was compelled to pay a rate in excess to the rate being paid with regard to the conventional energy. For the said reason, the 2nd respondent-APERC was approached with a proposal to make amendment to Article 1.4 of the agreements. It appears that the 2nd respondent by letter dated 15.11.2003 though approved the amendment proposed to Article 1.4 in the agreements applicable to Mini-Hydel and Wind Farm Power Projects, so far as Bio-mass Power Projects are concerned, the amendment proposed was approved partly as under:

"Explanation 2: The delivered energy shall be limited to the energy calculated at 100% PLF with net exportable capacity i.e, after deducting capacities for Auxiliary consumption and Captive consumption from Installed Capacity and as mentioned in Preamble & Schedule I of Agreement for sale to APTRANSCO. Whenever generation exceeds the installed capacity, the energy delivered by the project above 100% PLF during such periods will not be accounted for the purpose of payment."

The said letter dated 15.11.2003 also makes clear that the approved amendment shall be incorporated in all the existing/to be entered Power Purchase Agreements in respect of Non-conventional energy power projects. Admittedly, so far as the petitioners, who are the existing agreement-holders, the said amendment has not been carried out. However, the 1st respondent sought to implement the same under the impugned proceedings dated 26.06.2004 thereby, deducting the amounts towards the quantum of excess energy delivered above 100% PLF during each 30 minutes time block for the months from December, 2003 to May, 2004. The allegation of the petitioners that they were neither put on prior notice nor details as to how the said amount was arrived at were furnished, has not been contradicted by

the respondents. The 1st respondent for the first time has come out with an explanation in the counter-affidavits that the 30 minutes time block was calculated on the basis of the normal production for the declared installed capacity of the petitioners' projects at 100% PLF.

Whereas the learned Counsel for the petitioners vehemently contended that the order of the 2nd respondent-APERC dated 15-11-2003 affecting the interest of the petitioners, without any prior notice to them and without affording them an opportunity to raise their objections is arbitrary and illegal, the learned Senior Counsel appearing for the 1st respondent Corporation submits that the order dated 15-11-2003 is traceable to the power conferred on the APERC under Article 7 of the agreements and that the petitioners are bound by such decision.

The learned Counsel for the petitioners further contended that even where the APERC initiates proceedings suo motu as per Regulation-8 of the A.P. Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 it shall be by a notice to the affected or interested parties and after affording an opportunity of hearing as contemplated under Regulation-15. The learned Counsel also relies upon Section 86 (3) of the Electricity Act, 2003 which requires that the APERC shall ensure transparency while exercising its powers and discharging its functions. Since admittedly no such procedure was followed, the learned Counsel submits that the order of the APERC dated 15-11-2003 as well as the consequential proceedings of the APTRANSCO dated 26-6-2004, being violative of the principles of natural justice as well as the statutory provisions are liable to be set aside.

It is true that under Article 7 of the agreements in question the conditions in the agreements are subject to modification from time to time as per the directions of APERC, Government of A.P. and APTRANSCO. However, Article 9.2 of the agreements makes it clear that no oral or written modification of the agreements shall be of any force or effect unless such modification is in writing and signed by the duly authorised representatives of the company and the APTRANSCO. It was further stipulated that the amendments to the agreements as per the respective orders of

APERC from time to time shall be carried out.

However, in the case on hand, the petitioners were not parties to the decision of APERC dated 15-11-2003. As noted above, the said order was passed approving certain modifications proposed by the APTRANSCO to Article 1.4 of the Power Purchase Agreements which were already entered into with the petitioners. May be that, the 2nd respondent-APERC is conferred with the exclusive power to decide the tariff as well as the format and conditions of the agreements, however neither Article 7 of the agreements nor any other provision under the agreements or any Statute entitle the APERC to alter the terms and conditions of a concluded contract without any notice to the petitioners who are one of the parties to the agreements. Hence, I find force in the submission of the learned Counsel for the petitioners that the modification to Clause 1.4 of the agreements approved by the 2nd respondent-APERC is arbitrary and illegal and not binding on the petitioners.

It is also relevant to note that the modifications approved by the 2nd respondent, as can be seen from Annexure-II to the order dated 15-11-2003 do not indicate that 30 minutes time block shall be taken as the basis for determining excess energy. Obviously, the said calculation was made by the 1st respondent on its own. Such unilateral decision, without any notice to the petitioners, is contrary to the scheme of the Electricity Act, 2003 as well as the fundamental principles of natural justice.

That apart, admittedly, the modification said to have been approved by the 2nd respondent in its order dated 15-11-2003 has not been carried out in the Power Purchase Agreements in favour of the petitioners. Thus, the amendment, which does not form part of the agreements, under no circumstances, can be held to be binding on the petitioners. Hence, the impugned action of the 1st respondent in deducting the amounts in question is liable to be declared as arbitrary and illegal on that ground also.

Accordingly, the orders passed by the 1st respondent dated 26.6.2004 effecting deductions towards excess energy delivered above 100 percent PLF during each 30 minute time block for the months from December, 2003 to May, 2004, from the power purchase bills payable to the petitioners are set aside. Further, the proceedings of the 2nd respondent-APERC dated 15.11.2003, so far as the agreements with the petitioners herein are concerned, shall also stand set aside.

The Writ Petitions are accordingly disposed of with a direction to the 2nd respondent-APERC to consider the objections raised by the petitioners with regard to amendment to Article 1.4 as proposed by the 1st respondent in respect of the Power Purchase Agreements in favour of the petitioners herein and to pass appropriate orders afresh in accordance with law after hearing the petitioners. The petitioners are granted liberty to submit their objections with all the relevant supporting material within a period of three weeks from today, and thereafter, the 2nd respondent shall consider the same and pass appropriate orders within four weeks thereafter.

It is made clear that this Court shall not be understood to have expressed any opinion with regard to the rival claims made by the petitioners and the 1st respondent, and it is open to the 2nd respondent to take appropriate decision uninfluenced by any of the observations made in this Order.

The Writ Petitions are accordingly disposed of. No costs.

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G. ROHINI, J.

January , 2006.

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